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April 3, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: October 5, 2005

Case Number: TSO-0296

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual is eligible for access authorization. As discussed below, I find that access authorization should not be granted in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a Notification Letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a statement of the derogatory information causing the security concern.

A. The Notification Letter

The security concern cited in the Notification Letter involves the individual's excessive use of alcohol. The Letter stated that the

¹/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

individual is a user of alcohol habitually to excess, and has been diagnosed by a DOE consultant psychologist (hereinafter also referred to as consultant psychologist) as alcohol dependent in early full remission. The Notification Letter also indicated that the individual has not shown adequate evidence of rehabilitation or reformation. The letter states that in July 2004, the individual tested positive for alcohol while he was at work. Moreover, in August 2004, the site psychologist at the plant where the individual is employed diagnosed the individual as alcohol dependent. In March 2005, the individual refused to meet with the chief psychologist regarding treatment for his condition. The Notification Letter also referred to the individual's involvement in an incident of driving under the influence of alcohol (DUI) in 1984 and a 1982 incident of public drunkenness during which he struck his wife. According to the Notification Letter, this constitutes derogatory information under 10 C.F.R. § 710.8(j)(hereinafter Criterion J). ²

B. The DOE Consultant Psychologist's Report

The DOE consultant psychologist evaluated the individual on March 1, 2005. In his March 28 report based on the evaluation, the DOE consultant psychologist diagnosed the individual as suffering from alcohol dependence in early full remission. The consultant psychologist noted that the individual had not yet achieved the 12-month level of abstinence necessary to be considered in sustained full remission, and therefore had not demonstrated adequate evidence of rehabilitation or reformation.

In the report, the DOE consultant psychologist recommended that, at a minimum, this individual should demonstrate sobriety for a period of at least 12 months. He further recommended that the individual document at least twice-a-week attendance at a 12-step support group such as AA, and receive "treatment by an established alcohol counselor, the frequency and duration to be determined by this counselor's evaluation of [the individual]."

2/ Criterion J security concerns relate to an individual's use of alcohol habitually to excess, or to an individual's having been diagnosed by a psychiatrist or licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

C. The Hearing

Pursuant to 10 C.F.R. § 710.21, the individual requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual was represented by an attorney. The individual testified on his own behalf, and presented the testimony of his psychiatrist (individual's psychiatrist), his wife, his former supervisor, and an AA acquaintance. The DOE Counsel presented the testimony of the DOE consultant psychologist.

II. Hearing Testimony

A. The Individual

The individual admits he has a problem with alcohol. He stated that in the past he used alcohol to cure sleep problems, stress and depression related to workplace exposure to a toxic substance. Transcript of Personnel Security Hearing (hereinafter Tr.) at 47. He came to the recognition that he was using alcohol inappropriately when a co-worker smelled alcohol on the individual at work and reported him. At that point, in August 2004, the individual turned to the site psychologist for help. Tr. at 48. It was then that he stopped using alcohol completely and began attending AA. He attended 90 AA meetings in five weeks. Tr. at 50-53. He stated that he currently attends about two AA meetings per week, although he admits his pattern of attendance has been irregular, and there have been periods during which he has not attended AA. Tr. at 53, 69. He testified that he recently used alcohol on two occasions. In October 2005, he had a beer with a sandwich. He stated that this took place the night before he was to undergo medical testing related to the toxic substance exposure. The second use of alcohol came one month later in November 2005, when he had a beer to celebrate the homecoming of his step-son. He indicated that he enjoyed the first beer but did not enjoy the second, and has no plans to drink again. Tr. at 64-66.

He testified that he now understands that using alcohol does not solve his problems. Tr. at 55-56, 179-181. He stated that if he needs help with his problems now, he will turn to his psychiatrist. Tr. at 56. He states that he is a different person now from the one who used alcohol excessively, and cannot enjoy life if he uses alcohol. Tr. at 78.

B. The Wife

The wife testified that she has observed a distinct change in the individual's use of alcohol since August 2004. She confirmed that the individual did not use alcohol from August 2004 until October 2005, when he had one beer, and then confirmed that the individual had another beer in November 2005. She believes that she would be able to detect if he used alcohol again by the odor. Tr. at 10-13. She testified that he has been participating in AA, sometimes on a regular basis and sometimes sporadically. Tr. at 17. She indicated that he has used alcohol in the past to treat his depression. Tr. at 22. She also indicated that the individual gave up alcohol for two periods in the past, and then gradually resumed use to more substantial levels. Tr. at 21-23.

C. Former Supervisor

The former supervisor testified that he has known the individual for about two and one-half years on the job. The supervisor indicated that the individual is a hard worker and has good judgment on the job. Tr. at 26. This witness stated that he supervised the individual at the time that the co-worker noticed that the individual came to work smelling of alcohol. He stated that he was instructed to monitor the individual for a week after the initial observation, and then when the individual arrived at work again smelling of alcohol, he sent the individual for a breathalyser test, which came back positive. Tr. at 25-39.³ He stated that after this incident occurred, the individual told him that he had stopped using alcohol. The former supervisor testified that the individual told him in August 2004 that he did not plan to use alcohol in the future because his life was better without it. Tr. at 32. The former supervisor stated that the individual also showed him the medallion he received from AA, marking his one year of abstinence in August 2005. Tr. at 33.

D. AA Acquaintance

The individual's AA acquaintance testified that he met the individual at an AA meeting about a year prior to the hearing and he sees the individual at AA meetings about twice a week. He

3/ It appears that two breathalyser tests were performed. The first showed a blood alcohol level of .021. The second test, performed 15 minutes later showed a level of .011. At that point, the individual was returned to work. Tr. at 39, 162.

stated that the individual participates actively at meetings. He believes that the individual is familiar with the AA twelve step program. He was not aware of when the individual last used alcohol. He stated that he has socialized with the individual infrequently, and that during those times the individual did not consume alcohol. Tr. at 81-87.

E. The Individual's Psychiatrist

The individual's psychiatrist agreed with the diagnosis by the DOE consultant psychologist that this individual is alcohol dependent. Tr. at 100. He believes that the individual is currently in remission and also believes the individual intends to maintain sobriety, rather than using alcohol to self medicate. In his view, the stresses in the individual's life that caused his alcohol use were the toxic exposure, and marital and family discord. Tr. at 98, 107. He did not condone the October and November 2005 alcohol use. However, he did not believe that those incidents constituted a relapse because, in his view, relapse means intoxication, and the individual did not become intoxicated. Tr. at 111. He believes that the individual has undergone an attitude change that will prevent him from relapsing into intoxication. Tr. at 114. He further stated that there would be a "very small chance that he would relapse into intoxication." Tr. at 117. He saw no reason to conclude that the individual would not be able to refrain from alcohol use in the future.

F. The DOE Consultant Psychologist

At the hearing, the consultant psychologist reviewed and confirmed his diagnosis and recommendations of March 2005, in which he found the individual to be alcohol dependent. Even though the individual had resumed use of alcohol in October and November 2005, the consultant psychologist testified that the individual was still in full remission because he had not relapsed into intoxication. However, the consultant psychologist believed that the individual was not rehabilitated, since he had used alcohol on those two occasions. While he originally believed that the individual needed a full year of abstinence, he revised his opinion at the hearing and stated that, given the individual's recent usage, a two-year abstinence period would be a better standard. Tr. at 142-147. The consultant psychologist also expressed concerns about the individual's ability to abstain from alcohol use in the future. He noted that the individual had resumed alcohol use in a period of stress, the night before a medical procedure. Tr. at 132-36, 156. He questioned whether at this point the individual has the "tools" to address stressors without resorting to alcohol use. In this

regard, he cited the fact that the individual's AA attendance was not consistent. Tr. at 130-40. He also believed that the individual needed some additional therapy beyond AA. Tr. at 148-49. He further testified that this individual should abstain totally from alcohol use and should have consistent, sustained attendance at AA. Tr. at 142-43.

III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

The individual does not dispute the DOE consultant psychologist's alcohol dependence diagnosis. The issue in this case is therefore whether the individual has demonstrated that he is reformed and/or

rehabilitated from this condition. As discussed below, I find that the individual is not reformed/rehabilitated at this time.

As an initial matter, I am convinced that, as he testified, the individual was abstinent from August 2004 until October 2005. I believe that he had alcohol on two occasions, once in October and once in November 2005, and has been abstinent since then. I am also persuaded that the individual has gone through periods in which he participated regularly in AA. His abstinence and AA participation are very much in his favor.

However, I find that it is still early too conclude that the individual is reformed/rehabilitated from his alcohol problem for purposes of eligibility for access authorization. I cannot agree with the individual's psychiatrist that the use of alcohol in October and November 2005 should not be considered a relapse because the individual did not become intoxicated. I am not convinced by the attempted minimization of the significance of the resumed alcohol use. In this regard, I note that a key consideration for the psychiatrist was on what would be best for his patient, the individual. He stated that "the most effective thing that could happen for him would be to get back to work at his fullest level of competence and performance. . . ." Tr. at 167.

The psychiatrist's therapeutic approach does not address the concerns at issue here. My focus is quite different. I must determine not what is best for the individual, but rather whether he is fit to hold an access authorization. The concerns involve the individual's reliability and his ability to control his impulses.⁴ Thus, in this case, involving a security concern based on alcohol dependence, the DOE must be reasonably reassured that the individual can refrain from all use of alcohol for an appropriate period. I do not believe that the individual has demonstrated a sufficiently strong commitment to abstinence.

Of particular concern was that the October 2005 alcohol use took place at a time when the individual was having a medical test for a serious health concern, indicating a possible return to the former pattern of self-medication for stress and depression.

^{4/} The DOE Adjudicative Guidelines for Part 710 explain the concern raised by excessive use of alcohol as follows: "Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness." DOE Adjudicative Guideline G, 66 Fed. Reg. 47061, 47067 (September 11, 2001).

Moreover, the two alcohol uses occurred during the very period that this administrative review process was underway. The individual knew he was under scrutiny, and that his alcohol use would be the subject of the hearing. He had, at the time of the first alcohol use in October 2005, completed virtually all of the requirements for rehabilitation set out by the DOE psychologist. Nevertheless, he could not resist the temptation to have a beer and a sandwich in the city where he was having his medical test. He testified that he had heard that the local "sandwiches with one of the local dark beers went together like a horse and carriage. . . . They went good together. So I had that. And it was good." Tr. at 54. The fact that he was willing to end his 14 month abstinence and put his entire rehabilitation program into question for a sandwich and a beer suggests to me that he may still have some difficulty controlling his alcohol impulses.

Furthermore, the individual's wife testified that the individual refrained from alcohol use for two periods in the past, and in both instances resumed alcohol use not by immediate binging, but in small increments. Tr. at 21. The individual's most recent abstinence period began in August 2004, about 17 months before the hearing, and his most recent use of alcohol was in two small increments that took place only two to three months before the hearing. I do not believe that there is a sufficient abstinence period from which to conclude that the October and November 2005 events were aberrational and not likely to lead to a relapse into another period of excessive alcohol use.

In this case, while the individual was able to refrain from alcohol use for the original one-year period recommended by the consultant psychologist, he was not able to maintain the abstinence beyond 14 months. This suggests to me that the individual may not yet be able to fully control his alcohol impulses. Therefore, in this case, the revised two year abstinence period recommended by the DOE psychologist seems to be appropriate, given the relapse at 14 months. Thus, I believe that the individual has not yet maintained abstinence for an appropriate period.

I also have some concerns about the strength of the individual's overall recovery program. First, his commitment to AA is not a solid one. His attendance at AA meetings is irregular. Moreover, I believe that completion of 90 AA meetings in about 35 days, instead of the more common 90 days, is an indication that the individual may not have internalized key aspects of the AA program and was just "going through the motions." In this regard, the DOE consultant psychologist noted that such a speedy completion might indicate that the individual viewed the 90 meetings as "something to get out of the way . . . rather than make this a lifestyle. . . ." Tr. at 157.

I also do not believe that he has a sufficiently strong support system to help him in times of stress if he does feel the urge to use alcohol. He does not have a formal sponsor, and his relationship with the AA acquaintance who testified at the hearing does not appear to be a close connection. I concluded from the testimony of the AA acquaintance that he and the individual did not talk regularly about the individual's drinking problems and he did not know very much about the individual's alcohol use. Tr. at 85. For example, the AA acquaintance was not aware of when the individual last consumed alcohol. Tr. at 86.

The individual's wife also did not appear to be able to help him control his urge for alcohol. In this regard, she did not seem to have in place emergency measures that she was prepared to take to help prevent the October and November relapses. She stated that she tried to convince him not to use alcohol in October 2005, but on the second occasion in November she did not. She testified, "I try not to pry and nag a lot." Tr. at 19-20. This indicates to me that she is not a strong support figure for the individual in connection with his abstinence from alcohol.

Finally, the individual does not appear to have any professional support system beyond that of his psychiatrist, whom he has seen only twice. In this regard, I note that the DOE consultant psychologist recommended that the individual engage in some regular therapy program. Tr. at 134. The individual has not undertaken this step.

V. CONCLUSION

As the foregoing indicates, the individual has not resolved the Criterion J security concern cited in the Notification Letter. It is therefore my decision that granting this individual access authorization is not appropriate at this time.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: April 3, 2006